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28 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA

IN RE: VOLKSWAGEN “CLEAN DIESEL”)
MARKETING, SALES PRACTICES, AND)
PRODUCTS LIABILITY LITIGATION,)
_____)

MDL No.: 3:15-md-02672-CRB

24 This Document Relates to:)
25 *Environmental Protection Commission*)
26 *of Hillsborough County v. Volkswagen AG et al.,*)
27 *No. 16-cv-2210 (N.D. Cal.)*)

JOINT MOTION FOR A
SUGGESTION OF REMAND
PURSUANT TO 28 U.S.C.
§ 1407

1)
 2 *Salt Lake County v. Volkswagen Group of*)
 3 *America, Inc. et al.*, No. 16-cv-5649 (N.D.)
 Cal.))

Hearing date: February 25, 2020
at 10:00 a.m.

4 5 **NOTICE OF MOTION**

6 PLEASE TAKE NOTE that on February 25, 2020 at 10:00 a.m., or as soon thereafter as the
 7 matter may be heard, in the courtroom of the Honorable Charles R. Breyer of the above titled Court,
 8 located at the San Francisco Courthouse, at 450 Golden Gate Avenue, in Courtroom 6, 17th Floor in
 9 San Francisco, California, Plaintiff the Environmental Protection Commission of Hillsborough
 10 County, Florida (“Hillsborough County”) and Plaintiff Salt Lake County (“Salt Lake County” and
 11 collectively with Hillsborough County, the “Counties”), will, and hereby do, jointly move this Court
 12 for an order issuing a suggestion of remand of the cases listed above to the Judicial Panel on
 13 Multidistrict Litigation pursuant to 28 U.S.C. § 1407.
 14

15 A suggestion of remand is appropriate here based on considerations of judicial efficiency and
 16 the convenience conferred on the parties and witnesses of a remand to the transferor courts.
 17

18 **STATEMENT OF THE ISSUE PRESENTED**

19 Whether remanding the Counties’ claims to their respective transferor courts is now
 20 appropriate where any coordination of pretrial proceedings no longer serves the purposes of
 21 multidistrict litigation.

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 Pursuant to 28 U.S.C. § 1407, actions transferred to a single Multidistrict Litigation (“MDL”)
 24 are to be remanded to the district from which it was transferred “at **or before** the conclusion” of
 25 pretrial proceedings. (Emphasis added.) The Supreme Court has explained this instruction creates
 26 an obligation “to remand any pending case to its originating court when, **at the latest**, those pretrial
 27

proceedings have run their course.” *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34 (1998). As such, this Court has broad discretion to issue a suggestion of remand. *See, e.g., In re Evergreen Valley Project Litig.*, 436 F. Supp. 923, 924 (J.P.M.L. 1977) (“It is not contemplated that a *Section 1407* transferee judge will necessarily complete all pretrial proceedings in all actions transferred and assigned to him by the Panel, but rather that the transferee judge in his discretion will conduct the **common** pretrial proceedings” (Emphasis added.)).

Unlike the individual consumer actions consolidated in this MDL—most of which have been resolved through settlement—both Hillsborough County’s and Salt Lake County’s claims stem from violations of each county’s respective legislative acts, specifically, the Environmental Protection Commission of Hillsborough County, Florida’s Rule 1-8, Utah Administrative Code R307-201-4, Utah Code § 26A-1-123(1), Utah Code § 76-10-1601, *et seq.*, (3); and Utah Code § 76-10-806. The Counties are not claiming individual injury stemming from the purchase of any specific vehicle, but rather seek damages based on violations of state- or county-specific statutes relating to the pollution of Hillsborough County and Salt Lake County. Continuing to litigate these actions in this Court does nothing to further judicial efficiency, nor does it benefit or convenience the parties or witnesses. Accordingly, the Counties respectfully ask this Court to issue a suggestion of remand as to their cases.

FACTUAL AND PROCEDURAL BACKGROUND

The Judicial Panel on Multidistrict Litigation (“JPML”) issued an order on December 8, 2015, to transfer cases related to the Volkswagen defeat device to this Court.¹ The following day, this Court issued Pretrial Order No. 1, consolidating all of the cases brought into this action. Plaintiffs’ Lead

¹ ECF 1.

1 Counsel and Government Coordinating Counsel were appointed by Pretrial Order No. 7 on January
2 21, 2016.²

3 Hillsborough County and Salt Lake County filed lawsuits on March 24, 2016, and April 20,
4 2016, respectively. Subsequently, the JPML issued Conditional Transfer Order 33 on April 19, 2022
5 transferring Hillsborough County's claims to this Court,³ and Conditional Transfer Order 53 on July
6 25, 2016, transferring Salt Lake County's claims as well.⁴

7
8 On June 28, 2016, Lead Counsel filed a Motion for Preliminary Approval of the class action
9 settlement reached with Volkswagen regarding 2.0 liter engines,⁵ which was granted by the Court on
10 July 26, 2016.⁶ This settlement did not include the claims brought by either Hillsborough County or
11 Salt Lake County. The Court granted final approval to the 2.0 liter class action settlement on October
12 25, 2016, resolving the pending consumer claims for the members of that class.⁷

13
14 On February 16, 2017, the Court granted preliminary approval of the 3.0 liter vehicle
15 settlement with Volkswagen and its affiliates,⁸ and granted preliminary approval of the settlement
16 with Bosch AG.⁹ Final approval for both of these settlement agreements was granted on May 17,
17 2017, resolving the vast majority of the remaining consumer claims left in this action.¹⁰

18 After the resolution of these claims, Defendants filed motions to dismiss Hillsborough
19 County's and Salt Lake County's respective complaints on December 21, 2017.¹¹ The Court
20
21

22 ² ECF 2.

23 ³ ECF 1427.

24 ⁴ ECF 1911.

25 ⁵ ECF 1609.

26 ⁶ ECF 1688, amended by 1698.

27 ⁷ ECF 2102.

28 ⁸ ECF 2919.

⁹ ECF 2920.

¹⁰ ECF 3229, 3230.

¹¹ ECF 4583, 4584.

1 dismissed both pre- and post-sale claims as preempted by the Clean Air Act (“CAA”).¹² However,
 2 on June 1, 2020, the U.S. Court of Appeals for the Ninth Circuit reversed the Court’s decision as to
 3 post-sale claims, holding that post-sale software updates are not preempted by the CAA.¹³ The U.S.
 4 Supreme Court denied Defendants’ petition for *certiorari* on November 15, 2021.¹⁴ Accordingly, the
 5 Counties’ claims that Defendants’ post-sale software updates violated Hillsborough County’s and
 6 Salt Lake County’s respective laws concerning unlawful tampering remain to be decided.

7
 8 It is the Counties’ understanding that all common proceedings in the remaining opt-out cases
 9 have been concluded.¹⁵ Thus, the only remaining factual and legal issues to be decided are individual
 10 claims unique to Hillsborough County and Salt Lake County. No issues common to all or any
 11 significant number of transferred cases remain.

12 ARGUMENT

13
 14 Part of the Court’s discretion to suggest remand to a transferor court involves determining
 15 whether consolidated proceedings have “run their course.” *See Lexecon Inc.*, 523 U.S. at 34. But the
 16 standard for whether the consolidated proceedings have “run their course” is not whether **every**
 17 **possible pretrial proceeding** has been exhausted. A JPML reference “does not mean . . . that *all*
 18 pretrial matters need to be—or even should be—resolved by the transferee court.” *In re Bisphenol-*
 19 *A (BPA) Polycarbonate Plastic Prod. Liab. Litig.*, 276 F.R.D. 336, 339 (W.D. Mo. 2011).

20
 21 Matters related to the administration of individual trials—or matters that relate to
 22 only a few cases—should be decided by the court that will actually conduct the
 23 trial. The purpose of an MDL is to foster efficiency by having a single judge
 24 address and decide issues that will apply to all (or at least a significant number of)
 25 the transferred cases.

26 ¹² ECF 4979.

27 ¹³ *In re Volkswagen “Clean Diesel” Mktg., Sales Pracs., & Prod. Liab. Litig.*, 959 F.3d 1201 (9th Cir. 2020).

¹⁴ *Volkswagen Grp. of Am., Inc. v. Env’t Prot. Comm’n of Hillsborough Cty.*, 142 S. Ct. 521 (2021).

¹⁵ *See* ECF 7506 at ¶ 2.

1 *Id.*; see also *In re American Continental Corp./Lincoln Sav. & Loan Secs. Litig.*, 102 F.3d 1524,
 2 1543 (9th Cir. 1996) (Kozinski, J. dissenting) (“section 1407(a) does not transfer a case for the
 3 conduct of all pretrial proceedings, only those that are ‘coordinated or consolidated’), *reversed by*
 4 *Lexecon Inc.*, 523 U.S. 26.

5
 6 Rather, proceedings should only continue to be consolidated if doing so would serve the twin
 7 purposes of multidistrict litigation: judicial efficiency, and the benefit and convenience of the
 8 individuals whose cases have been drawn from the court they originally chose. “The JPML often
 9 remands where doing so ‘will serve the convenience of the parties and witnesses and will promote
 10 the just and efficient conduct of the litigation.’” *In re Light Cigarettes Mktg. Sales Practices Litig.*,
 11 832 F. Supp. 2d 74, 77 (D. Me. 2011) (quoting *In re Air Crash Disaster at Tenerife*, 461 F. Supp.
 12 671, 672 (J.P.M.L. 1978)). As shown below, continued consolidation of pretrial proceedings of the
 13 Counties’ respective state- or county-specific claims remaining here serves neither of the factors
 14 above: it is neither more efficient than resolving these individual claims in the individual courts from
 15 which they came, nor is it convenient or beneficial to the individual Counties.

17 **A. Continued Consolidation of the Counties’ Claims Do Not Promote Judicial Efficiency.**

18 As stated above, resolution of the Counties’ claims turns on the interpretation and application
 19 of Hillsborough County’s and Salt Lake County’s respective laws concerning unlawful tampering.
 20 These differing state/county laws have different elements, different burdens of proof, and different
 21 damages standards. Because “an ‘MDL seeks to promote judicial economy and litigant efficiency by
 22 allowing the transferee court to preside over matters *common among all cases*[,]’ . . . the transferee
 23 court typically does not rule on cumbersome, case-specific legal issues.” *In re Activated Carbon-*
 24 *Based Hunting Clothing Mktg. & Sales Practices Litig.*, 840 F. Supp. 2d 1193, 1201 (D. Minn. 2012)

1 (emphasis added in original) (quoting *In re Phenylpropanolamine Prods. Liab. Litig.*, MDL No. 1407,
2 2004 WL 2034587, at *2 (W.D. Wash. Sept. 3, 2004)).

3 None of the issues left to be decided in either Hillsborough County's or Salt Lake County's
4 individual actions are common to either each other's cases or to any other cases remaining in the
5 MDL proceeding. For instance, not only are the Counties' individual claims based on whether the
6 Defendants' conduct violated their state- or county-specific statutes or ordinances, but the Defendants'
7 defenses are specific to each County's claims and the elements of their respective laws, as well.

9 Continued consolidation of the Counties' claims will do nothing to eliminate duplicative
10 discovery or conserve resources of the parties, counsel, or the judiciary. Should Hillsborough County
11 and Salt Lake County be permitted to proceed with their claims in the respective courts in which they
12 filed, Defendants can and will continue to conduct discovery in the same manner in which they would
13 proceed in this Court. Defendants have already proposed providing the Counties with the documents
14 produced and transcripts of depositions already taken in prior actions to eliminate duplication of
15 discovery. To the extent any additional discovery is sought, Defendants can provide the same to both
16 Hillsborough County and Salt Lake County without any additional effort. Plaintiff depositions will
17 necessarily need to be conducted in each of the Counties' cases separately, and will take place in
18 Hillsborough County and Salt Lake County, respectively.

20 Because everything remaining to be done in both actions is case-specific, this Court should
21 issue a suggestion of remand to the JPML regarding both Hillsborough County's and Salt Lake
22 County's cases. *See In re Light Cigarettes Mktg. Sales Practices Litig.*, 832 F. Supp. 2d at 77.

24 **B. Continued Consolidation of the Counties' Claims Does Not Benefit the Parties.**

25 The second element to be considered by this Court in deciding whether to exercise its
26 discretion to issue a suggestion of remand is the convenience and benefit to the parties. As stated
27

1 above, the way in which discovery is conducted will not benefit or convenience either party by
2 proceeding in this Court, as the manner in which the parties proceed with discovery will not change.
3 Defendants intend on producing the same documents previously produced in other matters. However,
4 the convenience of the Counties and their witnesses will be increased by proceeding in their respective
5 transferor courts, as the Counties' witnesses are located in these respective districts.
6

7 Moreover, the Counties and their counsel are not located in California, and continued
8 litigation in this Court presents increased inconvenience with traveling, as well as exponentially
9 increased travel costs for hearings and other proceedings before this Court. Such inconvenience and
10 increased cost far outweigh any gains the Court may hope to achieve by retention of the Counties'
11 claims.
12

13 The Counties' claims present case-specific questions unique to the state- and county-law of
14 their respective jurisdictions. As such, "the transferor courts, each of which is familiar with the state
15 law of their respective jurisdictions, are in a better position to assess the parties' state law arguments
16" *In re Light Cigarettes Mktg. Sales Practices Litig.*, 832 F. Supp. 2d at 77. Likewise, the
17 Middle District of Florida and the District of Utah have a greater interest in applying the laws that
18 fall within their districts. Accordingly, the only benefit to the parties and witnesses comes with
19 remanding these actions to their transferor courts.
20

21 **C. Remand of the Counties' Claims Will Not Pose a Risk of Inconsistent Pretrial Rulings.**

22 Finally, remand of the Counties' cases to their respective transferor courts will not pose a risk
23 of inconsistent pretrial rulings. Any rulings related to Hillsborough County's EPC Rule 1-8 will not
24 impact Salt Lake County's claims under its state-specific codes, and vice versa. Nor will any ruling
25 in the Counties' claims impact any remaining individual consumer actions that remain before this
26 Court. In fact, other state-law specific actions are already proceeding, or have concluded, outside of
27

1 this MDL. *See, e.g.*, [cite TX case and NH?]. For this reason, the central purpose of the JPML in
 2 transferring these cases has been achieved, and further consolidation is unnecessary.

3 CONCLUSION

4 The purpose of this MDL has been achieved as the vast majority of the consumer claims before
 5 this Court have been resolved. Any remaining claims have little to no central issues to be decided
 6 with either Hillsborough County's or Salt Lake County's state- and county-specific claims. The
 7 differing legal and factual issues are too great for continued consolidation to achieve any judicial
 8 efficiency, and there is no benefit to the parties or witnesses of continued consolidation, as the
 9 Counties will need to expound unnecessary expenses and time to continue litigating in a distant forum.
 10 It is not in the interest of either judicial efficiency or the parties—the twin aims of MDL
 11 consolidation—to proceed in this Court, and therefore this Court should issue a suggestion of remand
 12 as to Hillsborough County's and Salt Lake County's cases to the JPML.
 13
 14

15 Dated: January 21, 2022

16 Respectfully submitted,

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In accordance with Civil Local Rule 5-1(h)(3), I attest that concurrence in the filing of this document has been obtained from the signatories.

C. Lance Gould

I hereby certify that on January 21, 2022, I electronically filed the foregoing document through CM/ECF system, which will provide electronic service notification to all counsel of record registered as CM/ECF users.

C. Lance Gould